

Locke Lord QuickStudy: FTC Proposes Broad Non-Compete Ban: ?What Employers Can Expect Next

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On July 9, 2021, President Biden signed an Executive Order aimed at “Promoting Competition in the American Economy.” Among the dozens of initiatives proposed within the order was a directive to the Chair of the Federal Trade Commission “to exercise the FTC’s statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.” After eighteen months, the FTC issued its earth-shattering proposal on January 5, 2023.

- *What does the Proposed Rule say?* The FTC’s proposed Noncompete Clause Rule would not only invalidate future non-compete agreements, but would also require employers to rescind existing non-compete agreements and notify employees “that the worker’s non-compete clause is no longer in effect and may not be enforced against the worker.” Notably, the proposed rule applies to all “workers,” which includes not only employees, but also independent contractors, interns, volunteers, apprentices, and sole proprietors. Thus, in an instant, every non-compete entered into in exchange for access to confidential information, bonus payments, pay raises, stock awards, or any other form of consideration, would be void. The only noted carve out is that non-compete agreements would still be allowed with an associated sale of a business, but only if the restricted party is an owner, member, or partner holding at least a 25% ownership in the business entity. The Rule would also invalidate all state non-compete laws that are less protective than the proposed complete ban.
- *Is the Proposed Rule law?* No. Importantly, the proposed rule is exactly that—proposed—and is not final. The proposal is open for public comments for 60 days, after which time the FTC may work to finalize the rule based on input it receives. According to the FTC’s initial indications, the earliest the rule would go into effect is 240 days from January 5, 2023, or early September, 2023. Moreover, there is a legitimate question whether the FTC has the authority to enact the Proposed Rule. Consequently, the Proposed Rule will be met with legal challenges, in the same way businesses and other stakeholders challenged OSHA’s COVID-19 Vaccination and Testing Emergency Temporary Standard and the CDC’s temporary eviction moratorium, both of which ultimately ended up at the United States Supreme Court. Thus, whether and when the Rule ultimately becomes effective remains uncertain.
- *What could happen next?* The FTC’s notice of proposed rulemaking does offer several potential alternatives to a complete ban. It should be noted that some state jurisdictions (such as Massachusetts and Washington, D.C.) recently went down a similar path and initially indicated they would enact complete bans on non-compete agreements, only to later reverse course. Today, both states permit non-compete agreements in certain circumstances, most notably limiting enforceability to individuals making above a certain salary threshold. This potential use of a salary minimum for enforceable non-competes is just one of the alternatives proposed by the FTC.
- *What can employers do in the meantime?* The FTC has invited the public to submit comments to the proposed rule as well as its potential alternatives. Any comments are due by March 10, 2023. The Proposed Rule follows on the heels of numerous FTC complaints alleging employers’ use of overly broad non-compete agreements amount to unlawful and anticompetitive conduct. As a result, employers would be wise to review their current

agreements to ensure they are carefully drafted to protect their business interests, are reasonable as to the time, geography, and scope of activities to be restrained, and are compliant with any applicable state laws.

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